SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 440

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OF APPELLEE, EMPLOYING PLASTERERS OF CHICAGO, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HOWARD ELLIS,
THOMAS M. THOMAS,
DON H. REUBEN,
Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STATEMENT OF APPELLEE, EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 7, par. 3 and Rule 12, par. 3 of the Rules of the Supreme Court of the United States, appellee, Employing Plasterers Association of Chicago, submits the following statement in opposition to appellant's statement

as to jurisdiction, and moves to dismiss the appeal or affirm the final judgment of the District Court.

I. Jurisdiction

The appellant, to obtain a review of the decision of the district court by this court, invokes Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

II. Question Presented

Whether a substantial question is presented to this Court when the district court holds that the activity of plastering walls by residents of the Chicago area in structures exclusively located in the Chicago area is not within the purview of the Sherman Act because the activity is local in character and has no effect upon commerce.

III. Statute Involved

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2 and 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
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> * * * * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

IV. Statement of the Case

Appellant, plaintiff below, is appealing from an order granting the three defendants-appellees' motion to dismiss this action for failure to state a violation of the Sherman Act because of an absence of an effect upon commerce. The defendant, Employing Plasterers Association of Chicago, is a non-profit corporation composed of 39 of the approximately 140 plastering contractors who reside and carry on plastering activities in the Chicago area. Defendant, Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., is a trade union whose membership consists of journeymen and apprentice plasterers who live and work in the Chicago area. Defendant, Byron William Dalton, is president of Local No. 5.

The complaint filed by the appellant alleges that the defendants engaged in a conspiracy to restrain the trade of plastering in the Chicago area and to monopolize the marketing of plastering materials that are utilized in the performance of plastering contract work in the Chicago area. Various overt acts are alleged to have been perpetrated in the furtherance of the conspiracy and the appellant's complaint concludes that the activities of the defendants have had certain effects upon competition among plastering contractors in the Chicago area.

Since all of the activities of the defendants are within the Chicago area, an attempt has been made to imbue their actions with interstate characteristics by tracing the flow

of plastering materials into the State of Illinois and by charging that out-of-state plastering contractors are dissuaded from entering the Chicago market. Paragraph 11 of the complaint asserts that plastering contractors purchase material from local dealers who have acquired the goods from out-of-state sources. Some of these acquisitions are said to be pursuant to prior orders of the contractors. Paragraph 12 of the appellant's complaint alleges that some plastering materials are acquired by local dealers to meet regular anticipated demands of plastering contractors, and Paragraph 13 states that frequently material dealers request out-of-state suppliers to ship directly to the job site for the use of the plastering contractor. Paragraph 14 concludes that these defendants who skillfully combine the various materials purchased into an infinite number of different types and consistencies of plaster and construct with the products so produced walls, ceilings and ornamentation in the various structures located in the Chicago area are merely "conduits through which plastering materials manufactured and shipped from States other than the State of Illinois are sold and distributed to the consuming public in the Chicago area."

Absent from the complaint are any well pleaded allegations that either the flow of or market price of plastering and other construction materials imported into Illinois is affected by the alleged activities of the defendants or that the defendants so intended. All the alleged effects of the conspiracy are admitted to accrue in the Chicago area and even these effects are not charged to have reduced building in the Chicago area or to have driven industry elsewhere.

V. Opinion Below

The opinion below is unreported. It is reprinted in full as Appendix A annexed to the appellant's Statement as to Jurisdiction.

The district court (Perry, J.) accepted all of the well pleaded allegations of the complaint as true and dismissed the action. He found that the complaint contained a charge of "local restraint and monopoly by local labor and a local lathers[1] association, all confined to three counties in the State of Illinois. The alleged restraints do not become associated with the building material or ultimate cost of buildings until after the building materials have been purchased and have come to a state of rest in the State of Illinois, so far as the stream of interstate commerce is concerned." The court further noted that it was pure speculation to assume that there was any restraint whatsoever upon the flow of commerce.

The district court found it unnecessary to pass upon other objections made to the complaint. These objections were grounded upon the fact that all of the alleged overt acts were legitimate union activities within the penumbra of the labor exemptions of the Clayton Act.

VI. ARGUMENT

(a) The Complaint Fails to Charge a Burden upon Commerce

The district court's decision presents no substantial question to this court for its ruling is in strict conformity with the established principles articulated by past decisions.

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[1] The district court used a companion case against Chicago lathers as a basis for articulating his decision and stated that his "discussion relative to the lathing industry is equally applicable to the plastering trade and one opinion will serve for all of the cases at bar."

The appellant's complaint charges only a restraint upon the use of goods after they have reached their destination and not a restraint upon the flow of goods still in commerce. In *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062, the court held that while the latter is a violation of the Sherman Act, the former is not. Because the construction industry concerns itself with the use of goods after they have reached their destination, the industry has always been held to be local in character and cases are legion holding that a conspiracy aimed at controlling a local building market is not a violation of the Sherman Act. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062; *National Fireproofing Co.* v. *Mason Builders' Assn.*, 169 F. 259, *Albrecht* v. *Kinsella*, 119 F. 2d 1003, *United States* v. *San Francisco Electrical Contractors Assn.*, 57 F. Supp. 57. In fact, in *Albrecht* v. *Kinsella*, 119 F. 2d 1003, allegations similar to those in the appellant's complaint were held not to state a cause of action under the Sherman Act against comparable defendants—an association of plastering contractors, a labor union of plastering journeymen and an executive of that union.

The decisions relied upon by the appellant to sustain its complaint are inapposite here for they all concern themselves with restraints upon goods that have not reached their destination. It is also noteworthy that none of the cases cited in the Statement of Jurisdiction concern a local construction industry.

The court below also properly held that the allegations of restraint of commerce were speculative. The complaint describes a conspiracy to control a construction market in the Chicago area and concludes that there is thus a restraint of trade. The reported decisions, however, indicate that

such conclusions will not save the complaint if the well pleaded allegations fail to state a cause of action within the Sherman Act. *Mitchell Woodbury Corporation* v. *Albert Pick-Barth*, 36 F. 2d 974; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885; *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519. The district court thus properly held that the signal failure to set forth a burden upon commerce is not corrected by the appellant's sweeping charges and generalizations.

In the jurisdictional statement filed in *United States* v. *Employing Lathers' Association*,[2] it is noted that a trade union is made party to this action, but the appellant asserts, citing *Allen Bradley* v. *Local Union No. 3*, 325 U. S. 797, that since a conspiracy is charged the labor exemptions of the Clayton Act are inapplicable. A reading of that decision does not support the proposition that the impact of this court's holding in *United States* v. *Hutcheson*, 312 U. S. 219, can be obviated and pleadings made unassailable merely by alleging a conspiracy. In the *Allen Bradley* decision the union defendant entered into a conspiracy that included electrical contractors *and* electrical manufacturers. For aught that appears here the alleged agreement between the defendants is the product of legitimate and *bona fide* collective bargaining.

(b) The Appeal Subverts the Purposes of the Expediting Act

As is indicated in page 1 of the appellant's jurisdictional statement, a companion criminal case involving the identical issue here has been appealed to the Circuit Court of Appeals for the Seventh Circuit. In the normal course of

[2] Although this statement was not served upon these defendants, it is incorporated by reference to the jurisdictional statement filed in this case. Upon the request of counsel it was submitted informally on September 25, 1953.

events it will be reached for argument in January 1954. The policy of the Expediting Act might be better served if that case were permitted to proceed, thus giving the appellant an earlier hearing on the claimed errors of the district court. It is not inconceivable that the Seventh Circuit's ruling will eliminate this Court's acting in other than a summary manner.

If there is need for expedition, it is more than passing strange that any appeal was taken at all. The appellant should then have amended its complaint instead of choosing to have this Court rule upon the diaphanous commerce allegations contained in the complaint. If commerce has been affected, it would have been an easy matter to amend and state that effect with some degree of definiteness. Even now a new suit could be filed which does so. It is submitted that to delay obtaining relief until this Court passes upon mere matters of pleading containing allegations of the most scanty nature is to use the Expediting Act in a manner not contemplated by Congress.

For the foregoing reasons we submit that this Court should dismiss the appeal or affirm the court below.

Respectfully submitted,

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